Reinhart

New Mental Health Parity Guidance – Considerations Every Health Plan Sponsor Should Know

On July 25, 2023, the U.S. Department of Health and Human Services, U.S. Department of Labor and the U.S. Department of the Treasury (collectively, the Departments) issued a proposed rule (Proposed Rule) that would increase health plan sponsors' obligations under the Mental Health Parity and Addiction Equity Act (MHPAEA) and expose them to new consequences for noncompliance.

This alert provides a brief overview of MHPAEA and the Proposed Rule and concludes with a discussion of several key issues plan sponsors should consider even before the Proposed Rule is finalized.

MHPAEA Background

Enacted in 2008, the goal of MHPAEA is parity between mental health or substance use disorder (MH/SUD) benefits and medical/surgical (M/S) benefits. MHPAEA prohibits group health plan sponsors and many insurers from imposing more stringent financial requirements and treatment limitations (including nonquantitative treatment limitations, or "NQTLs") on MH/SUD benefits than on M/S benefits.

The Consolidated Appropriations Act, 2021 (CAA 2021) amended MHPAEA to require plans and insurers to perform and document detailed comparative analyses of the NQTLs that apply to MH/SUD benefits. The comparative analyses need to include information on NQTLs' design and application and must be made available to state and federal agencies, and covered individuals, upon request.

Although the intent is straightforward, the law has proven difficult to implement. Over the past decade, the Departments have emphasized that plan sponsors and insurers are falling short of their obligations under MHPAEA. As a result, MHPAEA compliance has become the Departments' number one enforcement priority. The tone of the preamble and the nature of the new obligations in the Proposed Rule indicates that the Departments are out of patience.

New Proposed Rule

Some of the key provisions in the Proposed Rule include:

POSTED:

Aug 15, 2023

RELATED PRACTICES:

Employee Benefits
https://www.reinhartlaw.com/practices/employee-benefits

RELATED SERVICES:

Mental Health Parity
https://www.reinhartlaw.com/services/mental-health-parity

RELATED PEOPLE:

Gregory A. Storm
https://www.reinhartlaw.com/people/gregory-storm

John L. Barlament
https://www.reinhartlaw.com/people/john-barlament

Stacie M. Kalmer
https://www.reinhartlaw.com/people/stacie-kalmer

Katherine R. Kratcha
https://www.reinhartlaw.com/people/katherine-kratcha

Paul Beery
https://www.reinhartlaw.com/people/paul-beery

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

- NQTL Requirements. The Proposed Rule establishes a three-prong test to determine whether an NQTL violates MHPAEA:

    1. *No More Restrictive*. An NQTL must not be more restrictive as applied to MH/SUD benefits than as to M/S benefits. Under the Proposed Rule, this will be determined by a mathematical test based on the dollars spent on MH/SUD versus M/S benefits.

    2. *Data Collection and Evaluation*. The plan or insurer must collect, evaluate and consider the impact of relevant data, including network composition data, on access to MH/SUD benefits relative to M/S benefits. If the plan sponsor or insurer identifies any material differences in access, it must address the deficiencies.

    3. *Design and Application*. As is required now, plans and insurers must satisfy requirements related to the design and application of NQTLs. The processes, strategies, evidentiary standards and other factors used to develop and apply an NQTL to MH/SUD benefits must be comparable and applied no more stringently than with respect to M/S benefits.

  The Proposed Rule includes limited exceptions to the three-prong test for NQTLs that apply "generally recognized independent professional medical or clinical standards," or NQTLs that are reasonably designed to detect or prevent fraud, waste and abuse.

- Meaningful Benefits Requirement. The Proposed Rule specifies that if a plan or insurer provides any benefits for an MH/SUD condition, it must provide "meaningful benefits" for that condition in every classification in which M/S benefits are provided (that is, in the various combinations of inpatient/outpatient and in-network/out-of-network coverage, as well as emergency care and prescription drug coverage).

- Comparative Analyses. The Proposed Rule provides additional details on the comparative analyses required by the CAA 2021, including form and extremely detailed content standards. The Proposed Rule also describes how and when plans and insurers must provide their analyses to state and federal agencies, and covered individuals.

Key Issues for Plan Sponsors: Increased Consequences of

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

Noncompliance

Group health plan sponsors should immediately consider several items from the Proposed Rule with respect to mental health parity compliance:

- Disclosure to Covered Individuals. The Proposed Rule includes several requirements that would apply specifically to employer-sponsored plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). First, the Departments made it clear that comparative analyses must be produced to covered persons within 30 days of a written request. An ERISA "plan administrator" (typically the same entity as the plan sponsor) that fails to produce its analyses on time could face penalties of up to $110 per day.

- Certifying Compliance. The Proposed Rule would require one or more named plan fiduciaries under ERISA to review the comparative analyses and certify that they comply with the specific content requirements. This new obligation would require plan fiduciaries to take a more hands-on role in assuring compliant analyses and could expose them to liability if their plan's comparative analyses are not actually compliant. We expect these certifications will be requested as part of the due diligence process in mergers and acquisitions.

- Short Timeline for Government Document Requests. The Proposed Rule solidifies the short turnaround time the Departments currently require for responses to their requests. In Departments' requests now, and under the Proposed Rules, plan sponsors must provide their comparative analyses within 10 business days. If a Department finds a comparative analysis deficient, sponsors have only 45 days to make corrections. If a comparative analysis is still deemed insufficient following the 45-day correction period, the plan sponsor will face the consequences described below.

- Stand-Alone Notice of Noncompliance and Public Naming in Report to Congress. After a Department makes a final finding of noncompliance, the plan sponsor must notify all covered persons within seven days. The notice cannot be combined with other notices, and on the first page it must state, in at least 14-point font:

    - Attention! The [Department of Labor/Department of Health and Human Services/Department of the Treasury] has determined that [insert the name of group health plan or insurer] is not in compliance with the Mental Health Parity and Addiction Equity Act.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

Additionally, the plan sponsor will be named as having violated MHPAEA in the Departments' next annual Report to Congress. Plaintiffs' attorneys may use these notices and Reports to Congress to file class action lawsuits.

- Stop Order for Noncompliant NQTLs. Last, if a Department makes a final finding of noncompliance, the plan sponsor will be ordered to stop applying the offending NQTL(s) until the plan is compliant. This could result in increased claim costs and additional fees from the plan's service providers.

Effective Date and Existing Legal Obligations

If finalized, the Departments' proposal would be effective for group health plans beginning on the first day of the plan year starting in 2025.

However, plan sponsors should be mindful that NQTL comparative analysis requirements have been effective under the CAA 2021 since February 2021. Accordingly, plan sponsors may wish to use the Proposed Rule to inform and revise their current compliance documents in advance of the final effective date, as it represents the most comprehensive insight to date on the Departments' views on MHPAEA compliance. Further, the Proposed Rule includes numerous instances of the Departments' reminding plan sponsors and insurers that many of the various compliance items set forth in the Proposed Rule have been required for some time.

Given the significant time and resources necessary to produce a sufficient comparative analysis, the short turnaround time for Department audits, and the consequences of noncompliance, plan sponsors should begin coordinating with legal counsel familiar with MHPAEA, as well as other service providers, to prepare and document, or update, their comparative analyses well in advance of 2025 or a plan audit.

If you have any questions about the potential impact these changes could have on your benefit plans or need assistance with preparing or updating comparative analyses, please contact a member of Reinhart's Mental Health Parity Team.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.